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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Petitioner has filed a supplemental brief arguing that the Federal Circuit's recent decision in *Confederated Tribes of the Colville Reservation* v. *United States*, No. 5099 (Apr. 29, 1992), conflicts with the court of appeals' decision in this case. Pet. Supp. Br. 3.* We disagree with petitioner's assessment. As petitioner concedes, the *Colville* decision "purports to follow the analytical requirements" applied in this case. *Ibid.* Indeed, the *Colville* decision reaffirms that a fair and honorable

* On May 6, 1992, we provided the Clerk of the Court with copies of that decision and asked that they be distributed to Members of the Court.

dealings claim must be premised upon a "special relationship," slip op. 22-23, see *Aleut Community* v. *United States*, 480 F.2d 831 (Ct. Cl. 1973), and it cites with approval the court of appeals' decision in this case, slip op. 25-26.

The Federal Circuit reversed and remanded the Claims Court's decision in *Colville*, because "the Claims Court erred in construing the legal issues as dispositive of the Tribes' moral claim and because the court failed to make fact findings on the existence *vel non* of a special relationship in light of the *Aleut* standard." Slip op. 30. As the Federal Circuit recognized, no such defects are present in this case. The Federal Circuit specifically stated:

> The Tenth Circuit, at the outset of its opinion, correctly identified the legal standard against which to measure the existence *vel non* of a breach of "fair and honorable dealings," that being the Court of Claims' four-factor test enunciated in *Aleut*.

Slip op. 25. There is, in short, no conflict between the Federal Circuit's decision in *Colville* and the court of appeals' decision here.

Petitioner renews its criticism of the court of appeals' decision based on the facts of this particular case. Pet. Supp. Br. 5-8. The court of appeals correctly concluded, however, that petitioner "has failed to demonstrate that in some way the government undertook a special relationship such that it would forego or restrict its historic rights under the Commerce Clause so that the government was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise." Pet. App. 11a. Thus, the United States did not act in an unfair or dishonorable fashion by subjecting Indian landowners to the same constitutional principles that apply to non-Indian landowners. In

Colville, by contrast, the Federal Circuit simply remanded the case for the Claims Court to make specific findings on whether the Tribes there made the sort of showing that petitioner here failed to make. Thus, the ruling in *Colville* presents no circuit conflict warranting review by this Court, especially in light of the interlocutory nature of that ruling and the non-recurring nature of the legal issue.

For the foregoing reasons and the reasons set forth in our brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

MAY 1992